

Laws of the Fortieth Legislature, the same being House Bill No. 463; providing all things necessary and incidental to the purpose of this Act, whether mentioned in this caption in detail or not, repealing all laws and parts of law in conflict herewith; and declaring an emergency."

Have had the same under consideration, and I am instructed to report the same back to the Senate with the recommendation that it do pass.

WOOD, Chairman.

Committee on Engrossed Bills.

Committee Room,

Austin, Texas, May 9, 1927.

Hon. Barry Miller, President of the Senate.

Sir: We, your Committee on Engrossed Bills, have had S. B. No. 1 carefully examined and compared, and find the same correctly engrossed.

MILLER, Vice-Chairman.

SECOND DAY.

Senate Chamber,

Austin, Texas,

May 10, 1927.

The Senate met at 10:00 o'clock a. m. pursuant to adjournment, and was called to order by Lieutenant Governor Barry Miller.

The roll was called, a quorum being present, the following Senators answering to their names:

Berkeley.	Pollard.
Bowers.	Price.
Floyd.	Real.
Greer.	Russek.
Hall.	Smith.
Hardin.	Stuart.
Holbrook.	Triplett.
Lewis.	Ward.
Love.	Westbrook.
McFarlane.	Wirtz.
Miller.	Witt.
Moore.	Wood.
Neal.	Woodward.

Absent.

Bailey.	Fairchild.
Bledsoe.	Parr.

Absent—Excused.

Reid.

Prayer by the chaplain.

Pending the reading of the Jour-

nal of yesterday, the same was dispensed with on motion of Senator Wood.

Petitions and Memorials.

(See Appendix.)

Communication From the State of Idaho.

The Chair laid before the Senate the following communication:

Department of State,

State of Texas,

Austin, Texas, May 9, 1927.

Hon. Barry Miller, President of the Senate.

My dear Sir:

We have been requested by the Secretary of State of the State of Idaho to refer the enclosed certified copy of Senate Joint Resolution No. 2 to the presiding officers of each branch of the Texas Legislature.

R. J. RANDOLPH,

Assistant Secretary of State.

State of Idaho,

Department of State.

I, Fred E. Lukens, Secretary of State of the State of Idaho, and custodian of the Seal of said State, do hereby certify that the attached is a full, true and complete transcript of Senate Joint Resolution No. 2, enacted by the Nineteenth Session of the Legislature of the State of Idaho and filed in this office the 7th day of March, 1927.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the seal of the State of Idaho. Done at Boise, Idaho, the Capitol of Idaho, this 31st day of March, A. D. 1927.

SEAL FRED E. LUKENS,
Secretary of State.

**SENATE JOINT RESOLUTION NO. 2
A Joint Resolution**

Proposing an application to Congress to call a Constitutional Convention for the purpose of amending the Constitution of the United States to make subject to taxation all evidence of indebtedness of the United States, the several States, municipal corporations, counties, and all taxing subdivisions and taxing units thereof, together with the interest on and income from such evidence of indebtedness.

Be It Resolved by the Legislature of the State of Idaho:

Section A. That with the concur-

rence of the Legislatures of two-thirds of the several States of the United States, application is hereby made to Congress to call a Constitutional Convention for the purpose of proposing an amendment to the Constitution of the United States; said proposed amendment to read as follows:

"Amendment No. 20

Section 1. All evidence of indebtedness of the United States, the several States, municipal corporations, counties, and all taxing subdivisions and taxing units thereof, together with interest on and income derived from such evidence of indebtedness, shall be subject to taxation by the United States, the several States, municipal corporations, counties, and all taxing subdivisions and taxing units thereof.

Sec. 2. The Congress and the several States shall have power to enforce this Article by appropriate legislation."

Sec. B. The Secretary of State is hereby directed to send duly authenticated copies of this Resolution to the Clerk of the United States Senate, the Clerk of the United States House of Representatives, and to the presiding officers of each branch of the legislature of the several States of the United States.

The communication was read and referred to the Committee on Federal Relations.

Simple Resolution No. 6.

Senator Smith sent up the following resolution:

WHEREAS two telephones have been added to the Senate's telephone service, necessarily increasing the number of calls and making it rather heavy for one person to handle, in order to relieve the operator and also give the Senate telephone service at night,

BE IT RESOLVED that Mrs. J. W. Stephens be appointed assistant telephone operator at the rate of five dollars per day.

Smith, Davis, Price, McFarlane, Stuart, Woodward, Neal, Moore, Witt, Bowers, Miller, Real, Lewis, Westbrook, Berkeley, Ward, Pollard, Floyd, Greer, Holbrook.

The resolution was read and adopted.

Bills and Resolutions.

By Senator Pollard:

S. B. No. 8, A bill to be entitled "An Act creating a Civil Service Commission for the State of Texas; including all State, municipal and county employees with certain exceptions; providing for a State Civil Service Commission, consisting of three persons appointed by the Governor; providing for municipal Civil Service Boards in cities of One Hundred Thousand or more inhabitants; providing for duties of said Civil Service Commissioners and Boards; prescribing the qualifications and requirements of employees with certain standard of classifications; empowering the Commission to make certain rules and regulations for examination and appointment; providing for reports of said Commissioners and prescribing penalties, abuses and frauds concerning said appointments; prohibiting said employees from participating in political campaigns; providing for civil suits in enforcing said Act and repealing all laws or parts of laws which are in conflict herewith."

Read first time and referred to Committee on State Affairs.

By Senator Ward:

S. B. No. 9, A bill to be entitled "An Act repealing Chapter 247 of the General and Special Laws of the Regular Session of the Fortieth Legislature and substituting for same a complete act so as to insert therein a saving clause in reference to offenses committed before this Act takes effect; amending Articles 1256 and 1257 of the Penal Code of 1925 so as to properly define murder, and fixing the punishment for murder; inserting in the Penal Code a new article numbered 1257-a relating to what may be proved, and considered by the jury, in determining the punishment to be assessed for murder; repealing Chapter 15 of Title 15 of the Penal Code of 1925 relating to manslaughter and all other laws in conflict with this Act; repealing Chapter 18 of Title 15 of the Penal Code of 1925; and declaring an emergency."

Read first time and referred to Committee on Criminal Jurisprudence.

By Senator Wood:

S. B. No. 10, A bill to be entitled "An Act providing a means of in-

creasing the efficiency of publicly supported institutions of higher learning in this State; creating the State Board of Higher Education; and prescribing its duties and functions; authorizing said board to secure the facts and information and study the needs in reference to publicly supported institutions of higher learning in this State; granting authority to said Board in order to prevent and eliminate duplications in the work of State institutions of higher learning publicly supported in this State; authorizing said Board to estimate the needs of such institutions and present them to the Board of Control to be included in the budget; making an appropriation to carry out the purposes of this Act; and declaring an emergency."

Read first time and referred to Committee on Education.

By Senators Greer, Floyd, Hardin, Moore, McFarlane, Neal and Ward.

S. B. No. 11, A bill to be entitled "An Act appropriating one and a half million dollars per year, or so much thereof as may be necessary, for the next two fiscal years for the purpose of promoting rural school education and equalizing the school opportunities afforded by the State to all children of scholastic age living in small and financially weak districts, allowing the State Board of Education and the State Superintendent of Public Instruction to aid such schools in accordance with conditions herein specified, providing certain prerequisites for the granting of such aid; providing for the maintenance of all rural schools which meet the requirements a term not exceeding six months solely out of the State and county school funds; providing aid for schools where extraordinary conditions prevent schools meeting all stated requirements; providing limited equipment for rural schools that will afford instruction and demonstration in home and farm vocations; providing assistance in the formation and maintenance of rural high school districts according to a county-wide plan; providing for the administration of this fund by the State Department of Education; providing for the manner of payment and disbursement of all money granted under the provisions of this Act, repealing all laws and parts of

laws in conflict therewith; and declaring an emergency."

Read first time and referred to Committee on Finance.

By Senator Love:

S. B. No. 12, A bill to be entitled "An Act amending the local road law of Dallas County so as to better provide for construction, reconstruction and repair of dirt roads connecting with the pikes or hard surfaced roads in said county, and so as to make more ample provision for the removing and preventing of impediments on the public highways of Dallas County such as junk, or debris, tin cans, glass or other similar impediments; and declaring an emergency."

Read first time and referred to Committee on State Highways and Motor Traffic.

Message From the Governor.

The Chair recognized the doorkeeper who introduced a messenger from the Governor with the following Executive Message:

To the Members of the Fortieth Legislature:

In the proclamation convening the Fortieth Legislature in extra session three questions were mentioned as meriting legislative consideration and being sufficiently urgent to justify the calling of the Legislature in extra session. These questions involved the passage of a general appropriation bill for the support of the Departments and institutions of the State Government through the ensuing biennium, legislation to further facilitate and promote the building of a correlated system of public highways through this State, and the enactment of a civil service law providing for the selection of subordinate State employees by a system of classified service.

Before discussing any of the details of either of these questions, I desire to mention certain things connected with the financial condition of the State.

At the time the Fortieth Legislature met in its regular session, it was considered probable that there would be a deficit in the revenues of the State by the close of the fiscal year amounting to approximately two million dollars. It was estimated that the unused appropriations made for the

present fiscal year amounted to \$14,121,320.50. Deficiency appropriations had been authorized by the Executive Office since the last session of the Legislature and prior to January 1, 1927, in the sum of \$180,500.00. Deficiency warrants to pay sheriffs and other officers' accounts were then outstanding in the sum of \$56,627.84, and it was estimated that \$200,000.00 additional would be necessary during the remainder of the fiscal year to meet other accounts of this nature. The amount of prior appropriations unused to January 1, 1927, was \$2,380,250.24. From these figures it was computed that approximately \$16,938,698.58 could be drawn against the income of the State during the remainder of the fiscal year. It was further estimated that the receipts for the fiscal year ending August 31, 1927, would be \$18,415,720.15, of which \$4,224,157.64 had theretofore been collected, leaving the estimated net income of the State for the year ending August 31, 1927, at \$14,502,426.39. On December 31, 1926, there was in the general revenue fund of the State Treasury the sum of \$1,342,967.12, with outstanding warrants amounting to \$681,045.22. It was upon these figures that the probable deficit was estimated at \$2,000,000.00.

Since those figures were compiled and furnished to me we have had a session of the Legislature and certain appropriations have been made from the general revenue fund.

During the regular session of the Fortieth Legislature the sums of money appropriated amounted to \$3,479,098.60. This figure may suggest to some that extravagant appropriations had been made. However, an examination of the appropriation bills discloses that the major portion of this money was appropriated to meet emergency needs of institutions and departments which had not been properly provided for by prior appropriations.

The distressing and long existing financial condition in the State Prison System was accountable for a considerable portion of this appropriation. The bonds or notes due Brown-Crummer Company amounted to \$750,000.00, and with interest due at their maturity date, which was in February, 1927, the total amount due on this obligation by

the prison system was \$787,500.00. Other notes and accounts of the prison system maturing prior to March 1, 1927, amounted to \$875,881.29. It was estimated that the operation of the prison system on a budget basis from March 1st to September 1st, the end of the fiscal year, would cost \$874,000.00. To meet this obligation the prison system had \$140,731.26. It was apparent from these figures the prison system needed \$733,268.74 to meet its current operating expenses through the last five months of this fiscal year. Therefore, the outstanding obligations of the prison system due prior to September 1, 1927, and the cost of operating the system from March 1, 1927, to September 1, 1927, amounted to the sum of \$2,596,650.03. To dispose of this item of indebtedness inherited by this administration, it was necessary to pay from the general revenue fund the sum of \$787,500.00 due the Brown-Crummer Company, and it was necessary to appropriate from the general revenue fund the sum of \$1,809,150.03. The appropriations made by the regular session of the Legislature included \$1,809,150.03 appropriated for the purpose of meeting the needs of the State prison system, and the Brown-Crummer obligation was paid in addition to this appropriation.

To meet deficiencies due district judges and prosecuting attorneys an appropriation of \$63,620.99 was made by the Fortieth Legislature in its regular session. Appropriations made to meet outstanding deficiencies authorized prior to January 18, 1927, amounted to the sum of \$180,921.38. Appropriations were made to meet the obligations of the Live Stock Sanitary Commission and support it until September 1, 1927, in the sum of \$179,500.00. For educational purposes there was appropriated \$1,032,386.00. The emergency appropriation bill carried appropriations for the Departments amounting to \$209,617.85. The eleemosynary institutions received in the emergency appropriation bill the sum of \$260,040.00. The above are some of the items which were carried by the appropriation bills passed by the regular session of the Fortieth Legislature.

I am conscious of the fact that perhaps some criticism may have

been made of my exercise of the veto power concerning a number of items included in the appropriations made by the regular session of the Fortieth Legislature. It is my purpose to exercise the utmost frugality in the conduct of the Government, and the items stricken from the appropriation bills were those I felt could be eliminated without permanent injury to any of the State departments or institutions.

Your attention is invited to a critical examination of the appropriations carried by the bills passed by the regular session of the Fortieth Legislature and upon such analysis

you will find that the major portion of the money thereby appropriated was to meet debts owing by the State Government and to meet needs which had not been properly provided for by prior appropriations. The major portion of the money was appropriated to satisfy what might be considered back debts of the State Government.

Since the adjournment of the regular session of the Fortieth Legislature figures have been compiled with reference to the total charges against the general revenue fund for the year ending August 31, 1927. The following is a tabulated list of these charges:

To appropriations by the 39th Legislature		\$21,977,694.46
To appropriations by the 40th Legislature		3,479,098.60
Unexpended prior appropriations that extend back for a period of several years	\$2,380,250.24	
Less estimated amount that should revert back to the State Treasury, based on the same estimate of previous years	2,000,000.00	380,250.24
Total Charge Against General Revenue, Year Ending August 31, 1927		\$25,837,043.30

Receipts of General Revenue Fund for the Year Ending August 31, 1927.

Cash balance in State Treasury credited to General Revenue Fund from Sept. 1, 1926		\$ 5,458,922.52
Total receipts arising from 23 cent ad valorem tax rate	\$8,342,869.80	
Less 20% to cover assessing, collecting and delinquents	\$1,668,573.96	
Less approximate amount of taxes remitted to various counties	505,774.21	
	\$2,174,348.17	
Net estimated income from 23 cent ad valorem tax		6,168,521.63
Estimated receipts from other sources of taxation during fiscal year		12,147,198.52
Estimated receipts from prison system based on results of prior year		177,071.31
Estimated amount of appropriation from general revenue to supplement available school fund which will not be used because of increase in gasoline tax		1,000,000.00
Estimated increase in receipts from sources of taxation other than ad valorem property based on experience of previous years		600,000.00
		\$25,551,713.98
Estimated deficit September 1, 1927		285,329.32

The foregoing figures do not reflect the financial condition of the Highway Department.

It was evident during the years of 1925 and 1926 that the system employed by the Highway Commission would eventually bring that Department into a state of hopeless insolvency. Those who had taken occasion to inform themselves, or who undertook to get information relative to its condition during the year of 1926, realized that its finances were heavily involved, but it was impossible to gain accurate and definite data concerning its exact financial status. This was not available until a hasty audit was made in February of this year. This audit disclosed to the general public a lamentable state of affairs that was not known to exist, and it was surprising even to those who had undertaken to keep themselves informed as to the status of the Department.

In my first message to the Fortieth Legislature I suggested the advisability of ascertaining the exact financial condition of the Highway Department, because I believed that such information was necessary before they could know what was necessary in order to save our highway program. The investigation Committee which was in session in this City during the latter part of the year 1926 undertook to learn something of the financial condition of the Department, but so far as I am informed the Committee was not able to obtain accurate and definite information on this point.

The condition of the highway funds, as disclosed by examinations conducted in February made it evident that the continuation of our highway program was contingent upon that Department being furnished with additional revenues. Many people had hoped and expected that all obligations to the Government could be met and all departments and activities supported without any increase in taxation. However, the disclosures of those who examined the accounts of the Highway Department made it evident that notwithstanding the prevailing attitude toward an increase in taxation, that one of two things had to be done. It was certain that either the continual construction and development of highways in this State would have to remain at a standstill for the next year or two, or that additional funds through an increase in taxes would

have to be supplied to the Department.

One of the startling disclosures with reference to highway funds was the fact that there were in the Highway Department at the time approximately \$1,000,000.00 of approved estimates for highway work which had not been paid. Not only was it true that the obligations for the cost of constructing the roads had not been paid as they matured and became due, but even Department employees and laborers were without pay for work done as far back as September and October.

The following figures were furnished me by those who superintended the investigation of the affairs of this Department: The cost of construction work then under contract and in process of performance was estimated at approximately \$6,250,000.00. However, I understand that this figure was not placed high enough, and that it has since developed that the cost of this work will be more than was originally estimated. The system of maintaining roads by contract through the year 1925 and their lack of proper maintenance during the year 1926 had spent the tax money of the people but the roads were not in the state of maintenance required by the Federal Government. I was advised that the Federal Government was expecting the State to spend for road maintenance during the year 1927 the sum of approximately \$10,000,000.00. It was ascertained that the cost of maintenance of the Department would amount to approximately \$500,000.00.

The machinery purchased by the State for the maintenance of roads when this function was entrusted to the Highway Department had been scattered from one end of Texas to the other. Instances were told of quantities of this machinery having been gathered together and sold for junk to secure money to purchase an automobile for some of the road employees. It has been said that much of this machinery will not be located and recovered by the State, although I understand men have been employed and placed out in the field undertaking to retrieve as much of it as possible. It was estimated that before the State could spend the money for the maintenance of roads and properly do the work of maintenance

that at least one million dollars worth of highway equipment would have to be purchased.

Upon adding the cost of construction work then in progress, the estimated cost of maintenance, the cost of supporting the Department and the cost of the equipment, it was estimated that the Highway Department needed not less than \$17,750,000.00 to meet and satisfy the above obligations.

The income of the Department was received from a motor tax, gasoline tax and other miscellaneous items of income. The yield of the motor tax was estimated at \$10,500,000.00. The receipts from the gasoline tax, at 1 cent per gallon on gasoline sold, was estimated at \$4,250,000.00. This last figure is obtained after deducting that portion of the gasoline tax which goes to the Available School Fund. The receipts of the Department from miscellaneous sources was estimated at \$50,000.00. Thus it will be seen that the Highway Department was confronted with the demand for \$17,750,000.00 and was faced with an income of but approximately \$14,800,000.00 to meet this demand. In addition to the above there was available to the State of Texas from Federal Aid approximately \$6,500,000.00, but there was no money in the Highway fund with which to match this Federal Aid. To meet this inherited deficit it was perfectly evident that an increase in taxes to finance the Highway Department was required or the development of the good roads program would have to mark time until the present rates of revenue would increase the funds of the Department. The Legislature wisely determined the development of our Highway System should progress, and that as between the two they would choose to raise the gasoline tax rather than leave the development of highways remain dormant for the want of sufficient funds.

Another of the commendable results of the increase in the gasoline tax is the yield of more money to the Available School Fund. This will reduce the amount of demands made upon the General Revenue Funds.

The foregoing are conditions which have been met, and you are now faced with the matter of making provision for the support of the de-

partments and institutions of the State Government through the ensuing biennium.

The Board of Control has recommended the appropriation of \$37,748,058.56 for the next two years.

Committees of the Legislature have been busy during the time since adjournment of the regular session endeavoring to prepare an appropriation bill. Generally I understand that the bill prepared by the Appropriation Committee of the House and that the bill prepared by the Finance Committee of the Senate will exceed the recommendations of the Board of Control. I believe you can safely estimate the income of the State for the next two years, based upon existing rates and sources of taxation will not exceed the sum of forty to forty-one million dollars.

The recommendation of the Board of Control does not include an appropriation for rural aid and neither does it include appropriations to supplement the Available School Fund. These are matters for which provision should be made.

I do not doubt but that some of the Departments of the State could suspend operations today and no ill effects would be felt by either the business of the State or any considerable number of its citizens, and the Government would continue to function just as efficiently and just as smoothly. But I am positive that you cannot neglect the elementary schools of this State without doing a lasting injury to Texas. The existence of free government depends upon an educated citizenship, and only people whose minds have been enlightened by education are capable of self government.

The vast majority of the people of this State never come in contact with any educational institutions except the graded schools. When the necessities of education are considered and the demands made upon our institutions are taken into account, I do not believe there is any better purpose for which public funds can be expended than to aid the elementary and rural schools in affording adequate and equal educational opportunities to the boys and girls of Texas. Whatever else may have to be sparingly treated in the appropriation of the public money, I believe that the public school system should

be properly supported. This does not mean that I do not favor an adequate support of our institutions of higher learning; on the contrary I favor a liberal policy toward these institutions. The grade schools are the basis of all education in this State, and the institutions of higher learning depend upon these schools and their efficiency before they can perform the public service for which they were originally intended. I agree with the sentiment expressed by President Wilson when he said that the thing which we need is to hear the murmur of the voices of the common people within the corridors of our colleges. The route to college lies through the grade school, and I hope that the opportunities for education will increase in this State, and that the means of education placed within the reach of the average boy and girl of Texas will be such as to equip that boy or girl to enter college, and such as to inspire an ambition to secure a higher education. I believe the grade schools are a matter of transcendent importance in our school system. It is, therefore, my suggestion that one of the prime considerations should be to see that provision is made for an adequate available school fund to properly support the elementary schools of the State, and that a more just basis of apportioning the rural aid fund be determined upon.

The increase in the gasoline tax will substantially increase the Available School Fund, but from the best estimates available, the Available School Fund will not be sufficient without an appropriation from the general revenue of the State.

The support of our institutions of higher learning is important, and the welfare of our State for the future is to be promoted by an adequate support of these institutions. Within the expectant revenue of the State I encourage you to be as liberal as possible with the cause of Education in our several institutions of higher learning.

It has been suggested, and the suggestion bears merit, that there is a duplication of work in these institutions, and that savings could be accomplished without impairment of the institutions by providing for elimination of some of the duplication. This is within the power of your Body. I realize the practical

obstacles which stand in the way. It has been long advocated in this State, and by some of your members, that a non-salaried board be created to have general supervision over this question. I submit this suggestion to you for your consideration, and in submitting the question I desire to say that in my judgment it contains merit, and that its adoption in principle is highly desirable.

The amount of revenue available should be ample to properly support the functions of this government. I urge that you measure the requests that are made of you by the expectant revenue for the biennium and that the bill ultimately passed be kept within such revenue.

Savings can be accomplished through the consolidation of some of the departments of the State government and through the elimination of some of the unnecessary positions now paid out of the public revenue. I suggest for your consideration the consolidation of the work done by the department of the Board of Reclamation with the work of the Board of Water Engineers. The work of these two departments is sufficiently related to justify their consolidation and I believe that in other boards and bureaus of the State government eliminations can be made and savings can be accomplished. No employees ought to be on the public payroll whose services are not essential to the legitimate functions of the government or who do not perform a public service commensurate with the salary paid for such service.

State Highways.

One of the most important departments of our State government is that having charge of highway affairs. As has been pointed out the Legislature has provided adequate finance for our Highway Department, but attention should be given to so constructing our laws that the development of the highways in this State shall be facilitated. The designation of between 20,000 and 25,000 miles of highway has heavily increased the burden of highway maintenance in Texas. Many miles of these roads are difficult, if not impossible, of proper maintenance. The demands upon the Highway Fund for maintenance of this exten-

sive mileage have substantially reduced the amount of money available for building permanent roads upon which the maintenance cost is low. I am advised by the Federal authorities that former maintenance of highways in this State has not been satisfactory, in that it does not measure up to the standards set by the Federal Bureau of Public Roads. The present Commission has been able in the few months it has been in office greatly to improve the condition of maintenance and their policy towards maintenance has met with commendation of the representative of the Federal Bureau of Public Roads.

Appropriate legislation should be passed to aid in the building of lateral roads extending out to the farms which are now on mud roads, but which bear a part of the tax to build good roads. This will reduce the number of requests for designation of highways, and ultimately reduce the amount which the State is now required to spend in the maintenance of highways. Certainly the State cannot build and maintain a highway in front of every man's door, but the thousands of our citizens who live far removed from the improved highways should receive consideration at your hands. It should be remembered that all these desire and need better roads, and laws should be adopted to the end that the interests of the people living on the farms may be properly safeguarded in the development of our highway system.

I do not believe that the Legislature can well afford to undertake by legislative enactment to fix the general policy of the Highway Department.

I do believe, however, a great improvement of our highway system can be accomplished by adopting the following policies:

1. That the Highway Commission shall cause to be made, under the supervision of its engineering force, a survey of all designated roads; and that such roads shall be classed as first, second and third class, according to character of construction, traffic demands, and relative importance in a connected and correlated system of public highways.

2. That in the construction of public roads, regardless of the funds used in the construction thereof, durable types of road building material should be used, demanding

only the minimum amount of maintenance, with the view of keeping a connected system of principal highways intended to serve the greatest number of citizens. Where roads are built from State and Federal funds, the plans should contemplate the completion of the principal highways of the State, accommodation of the greatest number of people and the heaviest traffic. Where the funds are insufficient to construct a road of durable type, the effort should be to use a type of construction which may be maintained at a minimum of cost until funds are available to complete the road with a more durable character of construction.

3. That the advice of the engineers and technical experts employed by the Highway Commission shall be followed in so far as possible and consonant with the good of the system.

4. That the program of maintenance of the large mileage of designated highways consisting of dirt and other unimproved roads which, for lack of funds, cannot be made into durable highways in the immediate future should include the substantial betterment year by year of such roads by proper drainage, grading and repairing of structures and using good material which would increase the serviceability at small cost.

These are matters of policy which should be left to the Highway Commission, rather than be made the subject of legislative enactments. I realize that as conditions change from time to time, a change of policy for the improvement of the road system should not be made impossible because of the existence of some legislative enactment.

I favor giving the counties a larger voice in the administration of highway affairs. I advocate the passage of a law which will give the Commissioners Court of a county in which a highway is to be constructed by the use in whole or in part of county funds, the right of representation to the extent that it shall have the privilege of naming some person who, as the representative of the county, shall sit with the Highway Commission and have a voice in the selection of the type of construction and in awarding the contract.

It will be necessary for certain measures to be passed in order to

provide for the situation created by changes in the Highway statutes brought about by the re-codification. In such laws as are passed it would be wise to eliminate in so far as possible the details of matters involving purely questions of policy.

Civil Service.

I believe that those who direct governmental policies should be responsible to public opinion, and that the appointive heads of departments should be subject to change with changing administrations, and that only those whose views are in accord with the prevailing popular will should formulate the policies which are to control the operations of government. This principle, however, does not extend to subordinate employees, and particularly to those places requiring technical knowledge and skill; and I believe that greater efficiency in the administration of government would be insured through the enactment of a classified civil service act which shall protect technical experts and subordinate employees in the service of the State by securing their tenure in office through changing administrations. I have consistently urged, as a sound policy of State government, the establishment of a system of merit for the civil service of the State, and urge upon the Legislature the most careful consideration of the subject by them, and that a measure wisely adapted to the conditions and requirements of Texas providing for a classified civil service be adopted.

I believe that the system can be adopted without increased cost to the taxpayers of Texas by employing some of the existing agencies of the government as a civil service commission, and that such employees as may be necessary to carry the system into effect can be paid from the fees incident to the examination of applicants.

In this connection, I digress to suggest to you that the constantly increasing call upon the Legislature, through the past few years, for more State employees, has given the State employees that are not actually needed in the civil branches of the government. With the selection of

subordinate employees upon a basis of merit, it is my judgment that increased efficiency will be secured and the number of State employees necessary to discharge the duties of the several Departments will be reduced.

One of the measures passed by the last Legislature failed to carry the proper saving clause to protect pending cases, and I submit for your consideration the passage of a saving clause to Chapter 272, Acts of the Fortieth Legislature. This is an Act amending Article 1256 of the Penal Code, and provision should be made to continue the prosecution of all pending cases of manslaughter.

I reserve for further messages such other questions as, from time to time, may be deemed of sufficient importance to merit consideration in this session.

Respectfully submitted,
DAN MOODY,
Governor of Texas.

Executive Department,
Austin, Texas, May 10, 1927.

To the Honorable Senate of the State of Texas:

Gentlemen: I respectfully submit for your confirmation the following appointments which I have made since the last session of the Legislature:

Honorable Stayton M. Hankins of Childress, Texas, as State Service Officer.

Messrs. W. J. Peterson and W. R. Lacy of Houston, as Public Weighers for Harris County, Texas; (their appointment has been recommended by the Senator and a majority of the Representatives of their district as required by Article 5692).

Honorable S. H. Sanders, Center, Texas; Honorable George Armistead, Houston, Texas; and Clifton H. Morris, Fort Worth, Texas, as members of the Committee to make a survey of the systems of accounting and auditing in the State Departments and institutions, and activities in connection therewith.

Honorable W. R. Boyd, Teague, Texas, as District Judge of the seventh Judicial District, composed of Freestone and Limestone Counties. This vacancy was caused by the death of Judge J. Ross Bell.

Honorable Clifford Braly of Panhandle, Texas, as District Attorney of the Thirty-first Judicial District of Texas.

Honorable Raleigh White of Brady, McCullough County, as a member of the Board of Directors of the Agricultural and Mechanical College of Texas. Honorable James L. Young, who was appointed to membership on this Board was unable to serve.

Mr. Tom Hickman, Tarrant County; Mr. Frank Hamer and Mr. John H. Rogers of Travis County; Mr. W. W. Sterling of Webb County and Mr. W. W. Wright of Wilson County, as Captains in the State Ranger Service effective May 15, 1927.

I appointed Honorable Newton P. Willis of Hemphill County, as District Judge for the Eighty-fourth Judicial District of Texas, on March 1, 1927. This appointment was inadvertently not submitted to you for confirmation at the Regular Session, and I respectfully submit the appointment at this time for your confirmation.

In certain messages to the last session of the Senate, I find that slight discrepancies appear in the initials or spelling of names in some instances in listing appointees. In order that all appointments may be regular in every respect, I re-submit the following for your confirmation:

Mr. Gus. A. Amundsen, Jr., of Galveston, as a member of the Texas Historical Board.

Mr. A. S. Bowers of Galveston, as a Public Weigher at Galveston, Texas.

Mr. M. E. Daniel of Honey Grove, as a member of the State Board of Medical Examiners.

Dr. E. C. Smotherman of Hillsboro, as a member of the State Board of Veterinary Medical Examiners.

Honorable A. C. Barnes of Arlington, as a member of the local Board of Managers of the North Texas Junior Agricultural College.

Dr. R. C. Dunn, College Station, Texas, whose appointment as a member of the State Board of Veterinary Medical Examiners I submitted to you for confirmation during the regular session of the Fortieth Legislature, has informed me that he is ineligible for membership on this Board, Dr. W. R. Sanderson, Brownwood, Texas.

With your advice and consent, I desire to appoint the following named persons to be members of the State Mining Board:

John LeGory of Crockett; E. S. Orgain of Bastrop; E. A. Camp of Rockdale; W. T. Beavers of Strawn; L. R. Stoddard of Calvin; B. B. Hollis of Lovelady.

Respectfully submitted,

DAN MOODY,
Governor of Texas.

The message was read and referred to the Committee on Governor's Nominations.

Executive Department,
Austin, Texas, May 10, 1927.

To the Honorable Senate of the State of Texas.

Gentlemen: With your advice and consent I desire to appoint the following persons whose names appear listed on the attached sheets to be Notaries Public of the counties respectfully shown thereon.

These appointments are for the Unexpired Current Term. In order that these persons may be permitted to qualify immediately your prompt confirmation shall be appreciated.

Respectfully submitted,

DAN MOODY,
Governor of Texas.

List of Persons to Be Appointed
Notaries Public in Various Counties in the State for the
Unexpired Current
Term.

Smith County.

C. R. Wallis, _____, Texas.

Anderson County.

J. B. Milner, Poynor, Texas.

Morris County.

M. A. Godfrey, Naples, Texas.

Henderson County.

J. W. Wylie, Poynor, Texas; J. B. Milner, Poynor, Texas; T. O. Milner, Poynor, Texas; J. T. Cobb, Athens, Texas; Julian P. Greer, La Rue, Texas; Jeff Allen, Poynor, Texas.

Cherokee County.

W. W. Parshley, Jacksonville, Texas.

Reagan County.

J. A. Slaughter, Big Lake, Texas.

Cass County.

James McCoy, Atlanta, Texas; O. G. Hines, Linden, Texas; E. W. Crow, Linden, Texas; Sam L. Henderson, Linden, Texas.

Franklin County.

J. A. Mattinson, Mt. Vernon, Texas; C. W. Killingsworth, Mt. Vernon, Texas; A. A. Lindsay, Winnsboro, Texas; H. C. Mitchell, Winnsboro, Texas; R. C. Campbell, Winnsboro, Texas.

Carson County.

W. M. Caldwell, Panhandle, Texas.

Upton County.

B. A. Sturdivant, McCamey, Texas.

Upshur County.

John H. Tackitt, Gilmer, Texas; T. R. Croley, Gilmer, Texas.

Hutchinson County.

Emett Miller, Borger, Texas; Bert Martin, Borger, Texas.

Harris County.

Trellis Leonard, 705 Union National Bank Building, Houston, Texas.

Ector County.

H. O. Gossett, Odessa, Texas; C. B. Collard, Odessa, Texas; Paul Moss, Odessa, Texas.

Winkler County.

A. D. Benson, _____, Texas.
The message was read and referred to the Committee on Governor's Nominations.

Senate Bill Signed.

After its caption was read, the Chair signed in the presence of the Senate, Senate Bill No. 1.

Senate Bill No. 3.

The Chair laid before the Senate on the calendar the following bill:

S. B. No. 3, A bill to be entitled "An Act making appropriations to pay the salaries of officers and employees of certain eleemosynary in-

stitutions of the State and other expenses of maintaining and conducting them for the two fiscal years beginning September 1, 1927, and ending August 31, 1929, as follows, to-wit: Abilene State Hospital, Austin State School, Austin State Hospital, Pasteur Institute, Confederate Home, Confederate Woman's Home, Deaf, Dumb and Blind Institute for Colored Youths, Girls' Training School, Home for Dependent and Neglected Children, State Hospital for Crippled and Deformed Children at Galveston, State Juvenile Training School, State Orphan Home, Rusk State Hospital, San Antonio State Hospital, Terrell State Hospital, State Tuberculosis Sanatorium, Wichita Falls State Hospital, State Psychopathic Hospital, and Criminal Delinquent Negro Girls' Home; and declaring an emergency."

The bill was read second time.

Senator Love sent up the following amendment:

Amendment No. 1, S. B. No. 3.

Amend by striking out "\$48,600" in each column in line 29, page 7, and inserting "\$72,900" in lieu thereof.

The amendment was read.

On the motion of Senator Wood, the amendment was tabled.

Recess.

The Senate at 11:55, on the motion of Senator Wood recessed until this afternoon at 2:00 p. m.

After Recess.

The Senate was called to order by Lieutenant Governor Miller at 2:00 o'clock p. m., pursuant to recess.

Senate Bill No. 3.

Senator McFarlane sent up the following amendment:

Amendment No. 1, S. B. No. 3.

Strike out \$50,000.00, line 15, page 19.

The amendment was lost.

Senator Witt sent up the following amendment:

Amendment No. 1, S. B. No. 3.

Amend Senate Bill No. 3, page 21, line 14, by striking out the words

"two dormitories" and inserting in lieu thereof the words "one dormitory". Also strike from line 19 the words "two wings" and insert in lieu thereof the words "one wing".

The amendment was read and adopted.

Senator Love sent up the following amendment:

Amendment No. 2, S. B. No. 3.

Amend by striking out in line 15 on page 28 in both columns: "\$38,400", and inserting in lieu thereof the following: "\$57,600."

The amendment was read.

On motion of Senator Wood the amendment was tabled.

Senator Pollard sent up the following amendment:

Amendment No. 2, S. B. No. 3.

Amend S. B. No. 3, page 44, by striking out lines six, seven, eight, nine and ten thereof.

The amendment was read.

Senator Hall moved to table the amendment. The motion prevailed by the following vote.

Yeas—11.

Berkeley.	Russek.
Hall.	Triplett.
Holbrook.	Ward.
Love.	Westbrook.
McFarlane.	Wood.
Real.	

Nays—11.

Floyd.	Price.
Greer.	Smith.
Lewis.	Stuart.
Moore.	Witt.
Neal.	Woodward.
Pollard.	

Absent.

Bowers.	Reid.
Hardin.	Wirtz.
Miller.	

Absent—Excused.

Bailey.	Fairchild.
Bledsoe.	Parr.

There being a tie vote, the Chair voted aye, and the motion to table prevailed.

Senator Wood sent up the following amendment:

Amendment No. 2, S. B. No. 3.

Amend S. B. No. 3, page 43, line 32, by striking out "\$150,000", and insert said sum in the second year.

The amendment was read and adopted.

Senator McFarlane sent up the following amendment:

Amendment No. 3, S. B. No. 3.

Amend S. B. No. 3, by striking out figures "\$150,000", line 32, page 43.

The amendment was read.

Senator Holbrook moved to table the amendment.

The motion to table prevailed by the following vote:

Yeas—23.

Berkeley.	Price.
Floyd.	Real.
Greer.	Russek.
Hall.	Smith.
Hardin.	Triplett.
Holbrook.	Ward.
Lewis.	Westbrook.
Love.	Witt.
Neal.	Wood.
Pollard.	Woodward.

Nays—3.

McFarlane.	Stuart.
Moore.	

Absent.

Miller.	Wirtz.
Reid.	

Absent—Excused.

Bailey.	Fairchild.
Bledsoe.	Parr.
Bowers.	

The bill was passed to engrossment.

On motion of Senator Wood, the constitutional rule requiring bills to be read on three several days was suspended and S. B. No. 3 was put on its third reading and final passage, by the following vote:

Yeas—23.

Berkeley.	Price.
Floyd.	Real.
Greer.	Russek.
Hall.	Smith.
Hardin.	Stuart.
Holbrook.	Triplett.
Lewis.	Ward.
Love.	Westbrook.
Neal.	Witt.
Pollard.	Wood.
McFarlane.	Woodward.
Moore.	

Absent.

Bowers. Reid.
Miller. Wirtz.

Absent—Excused.

Bailey. Fairchild.
Bledsoe. Parr.

The bill was read third time and passed finally, by the following vote:

Yeas—23.

Berkeley. Price.
Floyd. Real.
Greer. Russek.
Hall. Smith.
Hardin. Stuart.
Holbrook. Triplett.
Lewis. Ward.
Love. Westbrook.
McFarlane. Witt.
Moore. Wood.
Neal. Woodward.
Pollard.

Absent.

Bowers. Reid.
Miller. Wirtz.

Absent—Excused.

Bailey. Fairchild.
Bledsoe. Parr.

Challenge From the House.

The Chair laid before the Senate the following communication from the House:

Whereas, the game of baseball is a great national sport of the American people, having contributed much to the enjoyment of the outdoor loving Americans, and

Whereas, the State of Texas has recently undergone a series of tragic storms, and

Whereas, the House of Representatives of the State of Texas is ready, willing, and able to assist our citizens who lost their property and lives in every way to the end that suffering may be relieved;

Now, Therefore, Be It Resolved that the House of Representatives of the State of Texas hereby issues a challenge for baseball game to be played with any other State department of government at a time which will not interfere with the regular duties of the aforesaid House of Representatives, for a nominal admission fee, the entire proceeds to go to said storm relief;

Be It Further Resolved, that a copy of this challenge be sent to the Insurance Commission, the State Senate, and any other State Department which might feel able to cope with the House on the baseball diamond.

Signed: Woodall, Swain, Renfro, Jno. A. Long, Reno Eickenroht, Sheats.

The communication was read.

The Chair appointed Senators McFarlane, Stuart, and Pollard as a committee to arrange the game.

Senate Bill No. 2.

The Chair laid before the Senate on the calendar, the following bill:

S. B. No. 2, A bill to be entitled "An Act making appropriations to pay salaries of judges, and the support and maintenance of the Judicial Department of the State Government for the two year period beginning September 1, 1927, and ending August 31, 1929; and declaring an emergency."

The bill was read second time.

Senator Witt sent up the following amendment:

Amendment No. 1, S. B. No. 2.

Amend S. B. No. 2, page 7, line 4, by striking out the figures "\$720" and in lieu thereof insert the figures \$900.00.

The amendment was read and on the motion of Senator McFarlane was tabled.

Senator Stuart sent up the following amendment:

Amendment No. 1, S. B. No. 2.

Amend S. B. No. 2, by adding after line 24, page 2, the following: Typewriter, \$106.00.

The amendment was read and adopted.

The bill was passed to engrossment.

On motion of Senator Wood, the constitutional rule requiring bills to be read on three several days was suspended and S. B. No. 2 was put on its third reading and final passage, by the following vote:

Yeas—23.

Berkeley. Hall.
Floyd. Hardin.
Greer. Holbrook.

Lewis.	Smith.
Love.	Stuart.
McFarlane.	Triplett.
Moore.	Ward.
Neal.	Westbrook.
Pollard.	Witt.
Price.	Wood.
Real.	Woodward.
Russek.	

Absent.

Bowers.	Reid.
Miller.	Wirtz.

Absent—Excused.

Bailey.	Fairchild.
Bledsoe.	Parr.

The bill was read third time and passed finally, by the following vote:

Yeas—23.

Berkeley.	Price.
Floyd.	Real.
Greer.	Russek.
Hall.	Smith.
Hardin.	Stuart.
Holbrook.	Triplett.
Lewis.	Ward.
Love.	Westbrook.
McFarlane.	Witt.
Moore.	Wood.
Neal.	Woodward.
Pollard.	

Absent.

Bowers.	Reid.
Miller.	Wirtz.

Absent—Excused.

Bailey.	Fairchild.
Bledsoe.	Parr.

Simple Resolution No. 7.

Senator Wood received unanimous consent to send up the following resolution:

By Wood:

Be it Resolved by the Senate That Henry Canady, porter, be allowed pay for five days, and Buck Green, porter, three days for work done prior to the opening of the Legislature.

The resolution was read and adopted.

Executive Session.

On the motion of Senator Hall, the Senate at 3:45 went into Executive Session to consider nominations of

the Governor and the Committee on Governor's Nominations was instructed to report immediately.

After the Executive Session.

The Secretary reported to the Journal Clerk the confirmation of the following nominations in Executive Session:

Honorable Stayton M. Hankins of Childress, Texas, as State Service Officer.

Messrs. W. J. Peterson and W. R. Lacy of Houston, as Public Weighers for Harris County, Texas. (Their appointment has been recommended by the Senator and a majority of the Representatives of their district as required by Article 5692.)

Honorable S. H. Sanders, Center, Texas; Honorable George Armistead, Houston, Texas, and Clifton H. Morris, Fort Worth, Texas, as members of the Committee to make a survey of the systems of accounting and auditing in the State Departments and institutions and activities in connection therewith.

Honorable W. R. Boyd, Teague, Texas, as District Judge of the Seventh Judicial District, composed of Freestone and Limestone Counties. This vacancy was caused by the death of Judge J. Ross Bell.

Honorable Clifford Braly of Panhandle, Texas, as District Attorney of the Thirty-first Judicial District of Texas.

Honorable Raleigh White of Brady, McCullough County, as a member of the Board of Directors of the Agricultural and Mechanical College of Texas. Honorable James L. Young, who was appointed to membership on this Board was unable to serve.

Mr. Tom Hickman, Tarrant County, Mr. Frank Hamer and Mr. John H. Rogres of Travis County, Mr. W. W. Sterling of Webb County and Mr. W. W. Wright of Wilson County, as Captains in the State Ranger Service, effective May 15, 1927.

Honorable Newton P. Willis of Hemphill County, as District Judge for the Eighty-fourth Judicial District of Texas.

Mr. Gus A. Amundsen, Jr., of Galveston, as a member of the Texas Historical Board.

Mr. A. S. Bowers of Galveston, as a Public Weigher at Galveston, Texas.

Mr. M. E. Daniel of Honey Grove, as a member of the State Board of Medical Examiners.

Dr. E. C. Smotherman of Hillsboro, as a member of the State Board of Veterinary Medical Examiners.

Honorable A. C. Barnes of Arlington, as a member of the local Board of Managers of the North Texas Junior Agricultural College.

Dr. W. R. Sanderson, Brownwood, Texas, member of State Board of Veterinary Medical Examiners.

Members of the State Mining Board: John LeGory of Crockett, E. S. Orgain of Bastrop, E. A. Camp of Rockdale, W. T. Beavers of Strawn, L. R. Stoddard of Calvin, B. B. Hollis of Lovelady.

List of Persons Appointed Notaries Public in Various Counties in the State for the Unexpired Current Term.

Smith County.

C. R. Wallis _____, Texas

Anderson County.

J. B. Milner _____ Poynor

Morris County.

M. A. Godfrey _____ Naples

Henderson County.

J. W. Wylie _____ Poynor
J. B. Milner _____ Poynor
T. O. Milner _____ Poynor
J. T. Cobb _____ Athens
Julian P. Greer _____ La Rue
Jeff Allen _____ Poynor

Cherokee County.

A. W. Parshley _____ Jacksonville

Reagan County.

J. A. Slaughter _____ Big Lake

Cass County.

James McCoy _____ Atlanta
O. G. Hines _____ Linden
E. W. Crow _____ Linden
Sam L. Henderson _____ Linden

Franklin County.

J. A. Mattinson _____ Mt. Vernon
C. W. Killingsworth _____ Mt. Vernon
A. A. Lindsay _____ Winnsboro
H. C. Mitchell _____ Winnsboro
R. C. Campbell _____ Winnsboro

Carson County.

W. M. Caldwell _____ Panhandle

Upton County.

B. A. Sturdivant _____ McCamey

Upshur County.

John H. Tackitt _____ Gilmer
E. R. Croley _____ Gilmer

Hutchinson County.

Emett Miller _____ Borger
Bert Martin _____ Borger

Harris County.

Trellis Leonard _____
705 Union Nat. Bk. Bldg., Houston

Ector County.

H. O. Gossett _____ Odessa
C. B. Collard _____ Odessa
Paul Moss _____ Odessa

Winkler County.

A. D. Benson _____, Texas

Simple Resolution No. 8.

Senator Moore sent up the following resolution:

By Moore, Berkeley, Wood, Love, Woodward:

Whereas, There is always a pressing need for speedy publication and circulation of the Acts of the Legislature due to the great public interest in the laws amended and new laws passed each session;

Therefore Be It Resolved, That the Senate thank and commend Honorable Jane Y. McCallum, Secretary of State, and her corps of workers, for the promptness with which the Acts of the Regular Session of the Fortieth Legislature were published and circulated, less than sixty days transpiring between adjournment of the Legislature, on March 16th, and the publication of the Acts of that body.

The resolution was read and adopted.

Adjournment.

The Senate, at 4:05 p. m., on the motion of Senator Wood, adjourned until tomorrow (Wednesday) morning at 10:00 o'clock.

APPENDIX.

Petitions and Memorials.

Petition from numerous citizens of Dallas County asking for support of the following bills:

The Governor's Bill for Prison relocation and reorganization.

The appropriation for a new building for the Girls' School at Gainesville.

An adequate appropriation for the School for Delinquent Negro Girls.

(Telegram.)

Galveston, Texas, May 10, 1927.

Hon. Barry Miller, Lieutenant Governor and others, care Texas Senate, Austin, Texas:

Many thanks to you all for my appointment as page. Do not think I will be able to accept this session.

JOHN L. DARROUZET, Jr.

Committee on Enrolled Bills.

Committee Room,

Austin, Texas, May 10, 1927.

Hon. Barry Miller, President of the Senate.

Sir: We, your Committee on Enrolled Bills, have had S. B. No. 1 carefully examined and compared, and find the same correctly enrolled and have this day at 10:40 o'clock a. m., presented the same to the Governor for his approval.

FLOYD, Chairman.

THIRD DAY.

Senate Chamber,

Austin, Texas,

May 11, 1927.

The Senate met at 10:00 o'clock p. m. pursuant to adjournment, and was called to order by Lieutenant Governor Barry Miller.

The roll was called, a quorum being present, the following Senators answering to their names:

Berkeley.	Moore.
Bowers.	Neal.
Fairchild.	Parr.
Floyd.	Pollard.
Greer.	Price.
Hall.	Real.
Hardin.	Russek.
Holbrook.	Smith.
Lewis.	Triplett.
Love.	Ward.
McFarlane.	Witt.
Miller.	Woodward.

Absent.

Bailey.
Bledsoe.
Reid.

Westbrook.
Wirtz

Absent—Excused.

Stuart.

Wood.

Prayer by the Chaplin.

Pending the reading of the Journal of yesterday, the same was dispensed with on motion of Senator Woodward.

Petitions and Memorials.

(See Appendix.)

Bills and Resolutions.

By Senator Pollard:

S. B. No. 13, A bill to be entitled "An Act for the purpose of promoting the public school interests of rural schools and those of small towns, of aiding the people to provide adequate school facilities for the education of their children, by the appropriation of three million dollars per year, or so much thereof as may be necessary, etc., and declaring an emergency."

Read first time and referred to Committee on Finance.

By Senators Woodward, Ward:

S. B. No. 14, A bill to be entitled "An Act amending Section 3a of Chapter 274 of the General Laws of the Regular Session of the Fortieth Legislature, so as to insert therein a saving clause in reference to offenses committed before this act takes effect so that Section 3a as amended shall read as follows:

"Section 3-a. In all cases tried under the provisions of this Act, it shall be the duty of the court to define "malice aforethought" and shall apply that term by appropriate charges to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the Jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; provided, however, that no offense committed prior to the taking effect of this act, shall be affected hereby, whether an indictment has been returned or not, but in every such case the offender may be proceeded against and punished under the law as it existed prior to the